No. 49724-7-II
Pierce County No. 15-1-04941-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN S. STONE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Gretchen Leanderson, trial judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

FEDERAL AND OTHER STATE CASELAW

RULES, STATUTES, CONSTITUTION AND OTHER

A. ASSIGNMENTS OF ERROR

1. Appellant Justin Stone was deprived of his state and federal rights to trial by jury when an officer gave his opinion that Stone was possessing drugs with intent to deliver them, over defense objection, and the prosecution cannot meet its burden of proving the constitutional error harmless.

2. Another officer gave explicit or near-explicit testimony on Stone's guilt which violated Stone's rights and compels reversal despite counsel's failure to object below.

3. Improper, highly prejudicial and irrelevant evidence was admitted and counsel was constitutionally ineffective.

4. The multiple convictions for possessing with intent to deliver controlled substances violated the state and federal prohibitions against double jeopardy.

5. The sentencing court erred, as did the parties, in believing the firearm enhancements were required to run consecutively. Counsel was again ineffective.

6. Imposition of financial conditions of sentencing including immediate terms of repayment and onerous interest rates as "mandatory" on an indigent sentenced to a lengthy term of incarceration is in violation of Fuller v. Oregon, 417 U.S. 40, 44-47, 94 S.Ct. 2116, 40 L. Ed. 2d 642 (1974).

7. Appellant assigns error to the imposition of a $500 fine for "Crime Victim assessment," a $100 DNA Database Fee, a $200 Criminal Filing Fee, and a $250 Drug Investigation Fund fee. He also assigns error to the imposition of immediate payment imposed despite his sentence and the 12 percent interest, as well as the following preprinted findings on the Judgment and Sentence:

   ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial

obligations herein.

CP 383.

8. The sentencing court's imposition of discretionary and other fees on Mr. Stone despite his current indigency and lengthy sentence and based on a "boilerplate" preprinted judgment and sentence clause, in violation of State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).

B. QUESTIONS PRESENTED

1. Where appellant is charged with possession of controlled substances with intent to deliver, is it improper opinion testimony where the police officer witness declares his belief that the evidence showed the defendant had "possessed with intent to deliver?"

2. Does an officer witness give explicit or near-explicit opinion on the defendant's guilt where he testifies that, based on his "training and experience" and the evidence found in the police investigation, he believed the defendant was possessing the drugs with intent to deliver?

3. Can the prosecution meet the heavy burden of proving that an officer's improper opinion regarding appellant's guilt is "constitutionally harmless" where the state cannot prove that the evidence that the defendant possessed drugs with intent to deliver them was so overwhelming that every reasonable juror would necessarily have convicted even absent the error?

4. Is counsel prejudicially ineffective in failing to object to the introduction of highly prejudicial evidence of an irrelevant BB gun and uncharged criminal conduct?

5. Is it a violation of prohibitions against double jeopardy for a defendant to suffer multiple convictions and punishments for possessing with intent to deliver drugs found in the same home at the same time and alleged to be possessed with the same intent when the "unit of prosecution" is the intent to deliver in the future?

6. Is resentencing required where the court and parties mistakenly believed that the court did not have the authority to run the firearm enhancements concurrently instead of consecutively? Further, was counsel prejudicially ineffective in failing to be aware of

the relevant law?

7. In Fuller, the U.S. Supreme Court held that it violates constitutional mandates to impose criminal justice costs unless certain requirements are met, including that any payment must not be mandatory and any such system must take into account the ability of a defendant to pay. Does imposition of "mandatory" legal financial obligations on an indigent sentenced to a long term in prison violate these prohibitions? Further, did the trial court abuse its discretion in imposing discretionary drug fees on an indigent defendant?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Justin S. Stone was charged in Pierce County with 1) unlawful possession of methamphetamine with intent to deliver, charged with a firearm enhancement, a "major drug crimes" aggravator and a "school bus route stop" enhancement, 2) unlawful possession of oxycodone with intent to deliver, a firearm enhancement and a "school bus route stop" enhancement, 3) unlawful possession of hydrocodone with intent to deliver, charged with a firearm enhancement and the bus stop enhancement, 4) unlawful possession of Alprazolam with intent to deliver, charged with a firearm enhancement and a bus stop enhancement, and 5) first-degree unlawful possession of a firearm in the first degree. CP 40-43; RCW 9.41.010, RCW 9.41.040, RCW 9.94A.530, RCW 9.94A.533(6), RCW 9.94A.535(e), RCW 69.50.401(1)(2), RCW 69.50.435.

Pretrial proceedings were held before the Honorable Judges Megan Foley on December 10, 2015, and January 13, 2016, Stanley

Rumbaugh on February 16 and March 25, 2016, Michael Schwartz on June 29, August 18 and 23, September 7 and 8, 2016, and James Orlando on September 7, 2016. 1RP 1, 2RP 1, 3RP 1, 4RP 1, 5RP 1, 6RP 1, 7RP 1.[1]

A jury trial was held before Judge Gretchen Leanderson on September 19, 20, 21, 22 and 23, 2016, after which Mr. Stone was acquitted of possessing the Alprazolam with intent but convicted of the lesser offense of possession of Alprazolam with no enhancements, and guilty of unlawful possession of a firearm, and unlawful possession with intent to deliver methamphetamine, hydrocodone and oxycodone, all within 1,000 feet of a school bus route stop and all with a firearm enhancement. CP 188-96. The methamphetamine charge was not submitted to the jury with the "major drug crimes" allegation." CP 188-96.

Judge Leanderson imposed a standard-range sentence on December 2, 2016. CP 377-392. Mr. Stone appealed and this pleading follows. CP 402.

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[1]The verbatim report of proceedings consists of 12 volumes, not all of which are chronologically paginated. They will be referred to herein as follows:
the proceedings of December 10, 2015, as "1RP;"
January 13, 2016, as "2RP;"
February 16, 2016, as "3RP;"
March 25, 2016, as "4RP;"
June 29, 2016, as "5RP;"
August 18, 23, September 7 and 8, 2016, as "6RP;"
September 7, 2016 (before Judge Orlando) as "7RP;"
the four chronologically paginated volumes containing the trial and sentencing of September 19-23, 2016, and December 2, 2016, as "8RP;"
October 27, 2016, as "9RP."

2. Overview of relevant facts

On December 4, 2015, Lakewood Police Department (LPD) officers served a warrant at the home of Justin Stone. 8RP 137-38, 142, 201, 222-23. A key ring taken from Stone had the key to a locked safe found in a bedroom. 8RP 226-27. The bedroom had a "ledger" which an officer testified appeared to document "transactions like stolen items" for narcotics. 8RP 228. Also in the bedroom, in a dresser drawer, were found a wallet with identification from Stone, a digital scale, a plastic container with "residue," a "Crown Royal" bag with a pill bottle containing 13-grams of powder which was suspected methamphetamine and about 12 pills, which an officer said were "ten alprazolam prescription medi[c]ation, along with two Oxycontin pills." 8RP 144, 167, 180, 250, 338. An expert confirmed the identity of those pills later. 8RP 299. Some video surveillance recording equipment was on the top of the dresser and some cameras on the outside of the house. 8RP 168-70, 339.

In the safe was a large "baggie" of powder suspected to be methamphetamine, a "BB" gun, some documents an officer said showed "that the safe belonged to Mr. Stone," and a "two-shot" loaded gun. 8RP 228, 237, 253-59.[2] The safe was near the dresser. 8RP 259. Some video surveillance recording equipment was on the top of the dresser and some cameras on the outside of the house. 8RP 168-70, 339.

[2]Counsel's failure to object to admission of the evidence of the BB gun is discussed in more detail, *infra.*

Also in the safe were four prescription bottles. 8RP 240. One bottle contained 40 pills, one of which a state's expert tested and determined contained hydrocodone. 8RP 300. Another bottle had 199 small pills which tested positive for oxycodone and another 15 not tested which the expert thought had markings indicating they were oxycodone. 8RP 300. A third bottle contained 9 white pills which the expert did not test but which contained markings similar to some which were hydrocodone. 8RP 300-301. The fourth pill bottle contained 30 tablets which all looked the same and which were not tested. 8RP 301-302. The expert said the markings looked similar to oxycodone. 8RP 302. The total weight of the powder which tested positive for the presence of at least some methamphetamine was 361 grams. 8RP 300, 302.

No fingerprints were taken from the prescription bottles. 8RP 259-60. Two had no labels, one had a name partly scratched off and a fourth had a sticker over that area. 8RP 260. An officer noted the pills had all been "mixed in there" and said having pills and pill bottles like that was "consistent with what I've seen in the past about people that also sell prescription pills in addition to other items." 8RP 240-41.

Stone was brought out of the house by officers using a "ruse." 8RP 200, 222-23. An officer testified that he told Stone there was a search warrant "for methamphetamine." 8RP 203. The officer, Sean Conlon of the LPD, asked Stone if the police would find any "meth" in the house and, according to Conlon, Stone then admitted there was about 10 ounces of methamphetamine in the safe. 8RP 203-204. He

also told officers the key to the safe was on his ring. 8RP 203-04.

Mr. Stone also told the officer there was a gun in the safe. 8RP 204-205. According to Investigator Conlon, Stone said the gun had been given to him by his "Mexican supplier" of "meth" a week or so ago after Stone had been the victim of a burglary. 8RP 204-205. Conlon also said Stone told the officer he had started to sell because of his debt to his own drug supplier, which was in the thousands. 8RP 205. Conlon testified that later, after Stone's arrest, Stone told the investigator that he owed more than he had first admitted - more like a total of $20,000 of his own. 8RP 210-11.

Hamilton was the first officer to go through the door after Stone was arrested and said three women came out of the apartment when Hamilton called inside. 8RP 222.

An officer read from the suspected "ledger" some language which included the following sentences: "Shawna, 470. Took 28Gs plus one 30-milligram perc. Mike Blanchard owed you $10." 8RP 244. An officer said this was evidence "documenting the sales[.]" 8RP 245. Investigator Hamilton testified that "users" will shoplift to "buy" drugs with items their "dealer" needs. 8RP 246. The officer then read from the notebook found in the home a page which included, "Blue Columbia, XL, $50. Black Water XL, 50." 8RP 246.

No fingerprints were taken from the ledger. 8RP 259. It was established that there was at least one school bus route stop within 1,000 feet of the home. 8RP 333.

D. ARGUMENT

1. IMPROPER OPINION TESTIMONY WAS ADMITTED WHICH VIOLATED APPELLANT'S RIGHTS TO TRIAL BY JURY AND A FAIR TRIAL

Both the state and federal constitutions guarantee the right to trial by jury. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Sixth Amend. Art. I, § 21 and § 22. As part of these rights, a person accused of a crime is entitled to have jurors serve as sole judges of the evidence, including its weight and credibility. 125 Wn.2d at 838.

It is therefore improper and a violation of the appellant's rights when a witness gives their opinion about the defendant's guilt, his veracity or credibility - or that of any witness. State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2005). The right to have the jury alone decide factual questions "is crucial to the right to trial by jury." Montgomery, 163 Wn.2d at 590. Even inferential opinions on the defendant's guilt, veracity or credibility or that of any witness are improper. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). Where a comment is only an inferential opinion, however, if counsel does not object at trial, that inferential opinion alone will not support reversal. See Montgomery, 163 Wn.2d at 590.

Stone's counsel below objected to some - but not all - of the testimony below. But even if he had not - and even for the evidence for which counsel did not raise explicit objection - Stone would be entitled to relief, because the improper opinion testimony was explicit or near-explicit and the prosecution cannot meet the heavy burden of proving the constitutional error harmless. In the alternative,

counsel's prejudicial failures on this issue are an independent basis to reverse.

a. Relevant facts

1) *Investigator Martin*

At trial, LPD detective Jeff Martin testified about being part of the special operations unit in narcotics investigation (8RP 129-30), saying he had an expertise in "street gangs and narcotics" (8RP 139), had specialty assignments "directly tied to narcotics" and "hundred and hundreds of hours of follow-up training" (8RP 131-32), which he later corrected to "more in the thousands" (8RP 132-33). Martin said he had to take a test to become a detective and required "narcotics detection training," including "very specific training with the identity of different categories of narcotics, the physiological aspects" and "common items" associated with drugs (8RP 133-35). He described being on task forces involving narcotics, being "assigned to FBI safe streets violent crime task force" (8RP 135), and being involved in "[o]ver a thousand" narcotics investigations (8RP 136).

The prosecutor asked if, given that "experience and training," the officer could recognize a particular "type of narcotic" by just looking at it. 8RP 135. The detective said "yes." 8RP 137. A few moments later, he declared that he found, in Stone's dresser drawer, a pill bottle containing "approximately 13 grams of methamphetamine, ten alprazolam prescription mediation [sic], along with two Oxycontin pills." 8RP 144, 167. He repeatedly referred to as the pill bottle "containing" the suspected drugs as actual drugs. 8RP 144-49, 167.

Finally, the following exchange occurred:

[PROSECUTOR]:	One final question for you, sir: **Given the items you had found inside the house, did you draw a conclusion as to what the defendant was doing**?
[COUNSEL]:	I object. Within the province of the jury.
[PROSECUTOR]:	Perhaps I could rephrase.
THE COURT:	Would you rephrase, please?
[PROSECUTOR]:	Certainly.
	Given your numerous years of being involved in the narcotics division and your training and experience, the items you found in this home, based on that, did you draw a conclusion as to what the defendant was doing?
[COUNSEL]:	I object. That's giving an opinion as to the ultimate question for this jury.
THE COURT:	You know, overruled.
THE WITNESS:	Yes.
[PROSECUTOR]:	And what did you based that on?
THE WITNESS:	It was based on the totality of the investigation, the items that I located, along with additional items that other officers/investigators located.
	I concluded that Mr. Stone was in possession of narcotics with intent to distribute.
[PROSECUTOR]:	No further questions at this time, Your Honor.

8RP 180-81 (emphasis added).

2) *Investigator Conlon*

LPD Investigator Sean Conlon testified about going through

basic training, working patrol, working on an "anti-crime team" on "drug-related crimes," and having worked in "Hilltop" in Tacoma and taking a position with LPD years ago where he "went into the special operations unit working narcotics and gangs." 8RP 186. Conlon told the jury he had been involved in "[w]ell over a thousand" narcotics investigations," most of which he led (8RP 186), had "over a thousand hours of post-academy training, specifically in the narcotics field and related gang field," studied "both basic and advanced narcotic investigation" at trainings several times a year, had done "various trainings with the DEA," had "assisted DEA" in "large-scale operations," and was assigned to the "South Sound gang task force" with the FBI (8RP 187), had "arrested a drug dealer" "[m]any, many times" (8RP 187-88), had worked with confidential informants (8RP 188) and had worked as an undercover buyer. 8RP 189.

When counsel objected that the testimony was irrelevant, the prosecutor said he was trying to establish Conlon's "expertise" in order to have him testify as "an expert witness in the world of narcotics." 8RP 190. The court overruled the objection. 8RP 190.

Conlon then went on, describing having sold narcotics "[a] couple dozen times." 8RP 189. The prosecutor asked if it would be "fair to say" that the officer was "an expert in narcotics investigation and detection," and the officer responded, "[y]es," also that he had been "recognized as such" and had trained others in narcotics investigation. 8RP 189-90.

The prosecutor asked if he was aware of whether, in the search

of Stone's home, they found any of the "tools that a drug dealer will use to conduct their business," 8RP 205. The officer said he believed "a scale was found, plastic baggies, packaging, methamphetamine in a Tupperware container, surveillance equipment, firearm, money." 8RP 205-206. The prosecutor then asked:

[PROSECUTOR]:	Looking at what you had found inside the home and given what Mr. Stone had indicated to you in his statements, **did you form an opinion as to what Mr. Stone was involved in?**
[OFFICER]:	Yes.
Q:	Okay. And on what did you base that opinion?
A:	**Again, on my training and experience and what we had found there and his own statements, that he was, in fact, selling methamphetamine.**
Q:	What's the narcotics that were found in Mr. Stone's home?
A:	Methamphetamine, oxycodone, hydrocodone, and I believe a few other types of pills.

8RP 206 (emphasis added).

The prosecutor also asked about the methamphetamine found, "[g]iven that quantity, what did that indicate to you?" 8RP 206. The officer responded, "**[t]hat he's a mid-level dealer of methamphetamine.**" 8RP 206 (emphasis added).

3) *Use of opinion by state*

In opening argument, the prosecutor emphasized that the State's witnesses were mostly professional investigators, "some with

quite a bit of expertise and history of working narcotics cases." 8RP 124. He told jurors about the search warrant and said that the "tactical team" had served the warrant "**as they believed there were items of contraband, narcotics at that house that he possessed in order to sell them to other individuals**." 8RP 124 (emphasis added).

After the testimony from the officers at trial, in closing argument, the prosecutor emphasized the experience and expertise of the various state officer witnesses, including one with "expertise in the field of gangs and narcotics" who told jurors he had information "that the defendant was engaged in the activity of illegal possess[ion] [sic] of drugs with intent to sell them[.]" 8RP 449-50 (Conlon). The prosecutor also pointed out that all of the state witnesses all had "extensive investigative experiences, all within the special operations unit." 8RP 451. The prosecutor told jurors that all of these witnesses with their "trained eye" said that the items found "show[] one thing: Someone engaged in the activity of drug selling." 8RP 452.[3]

b. <u>The officers gave improper opinion testimony on the defendant's guilt which compels reversal</u>

The testimony of both officers was highly improper, prejudicial opinion testimony which was explicit or near explicit and compels reversal under the "constitutional harmless error standard" which applies.

[3]The prosecutor's argument that the jury should find the pills were possessed with intent to deliver the drugs because there was "[n]o prescription around them" is discussed in more detail, *infra*.

An opinion is something "based on one's own belief or idea, rather than on direct knowledge of the facts at issue." State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). In general, it is not necessarily improper for a witness to give her opinion on an "ultimate fact," if it is otherwise admissible. See ER 704; see also State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

But no witness may testify about his opinion as to the guilt of the defendant, or his veracity and credibility, or that of other witnesses at trial. See State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994). Improper opinion testimony violates the right to trial by jury but also invades the jury's fact-finding province. See State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). This is because "the determination of the defendant's guilt or innocence is solely a question for the trier of fact." State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985).

An improper opinion, even by inference, will compel reversal when counsel objects to it below and the prosecution cannot prove the error harmless. See State v. Quaale, 182 Wn.2d. at 196. For example, in Quaale, the trooper said there was "no doubt" the defendant's ability to operate a motor vehicle was "impaired" after a certain test was administered. 182 Wn.2d at 195. The defendant objected that the testimony went to "the ultimate issue" but was overruled. 182 Wn.2d at 195. The Court reversed because the testimony was "an improper opinion on guilt by inference" because the jury was instructed to find guilt for driving while under the influence of intoxicating liquor and

further instructed that a person meets that standard "if the person's ability to drive a motor vehicle is lessened in any degree." 182 Wn.2d at 199-200. Because the officer testified that the defendant was "impaired," the officer had given such an improper indirect opinion on guilt. 182 Wn.2d at 200.

In this case, Mr. Stone's counsel objected below to only one of the comments on this grounds. But all of the comments below were not indirect or implied comments on guilt. Instead, they were explicit direct or near-direct opinions on guilt - whether Mr. Stone was possessing the drugs with intent to deliver, the essence of the state's case.

First, it is important to note that counsel objected properly to the first improper opinion testimony, but was overruled. 8RP 180-81; see, e.g., Montgomery, 163 Wn.2d at 596. In such a situation, counsel should not be faulted for failing to continue to make objections to similar evidence knowing it will be a fruitless gesture. Counsel's initial objection and the trial court's denial should be held to have preserved the issue regarding the other similar questioning and answers as well.

But even if not, both the opinion to which counsel objected and that to which counsel did not were explicit or at least near-explicit opinion on Mr. Stone's guilt. To determine if there has been such an opinion, the Supreme Court has set forth a five-factor test in Demery, supra. The reviewing court looks at 1) the type of witness involved, 2) the nature of the testimony, 3) the nature of the charges, 4) the nature of the defense and 5) the other evidence before the trier of fact.

Demery, 144 Wn.2d at 759.

Applying those standards here, the comments were improper explicit or near explicit testimony directly impacting the sole issue in the case - whether the pills were possessed with intent to deliver. Stone was charged with possessing with intent to deliver the methamphetamine and, separately, the oxycodone, hydrocodone and Alprazolam. CP 40-43. The officers were asked to give - and gave - their "conclusion" about whether Stone was possessing those drugs with the required intent.

First, the comments came from officers. It is a "well-recognized fact that police officers' testimony 'carries an 'aura of reliability'" even though their opinions on guilt have "low probative value." Montgomery, 163 Wn.2d at 595. An officer has expertise in determining whether she has probable cause to arrest, but that is a different question than whether there is guilt beyond a reasonable doubt. See id.; see Deon J. Nossel, Note: *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231, 244 n. 70 (1993). Here, the prosecution spend a large amount of time bolstering the officers as "experts," prior to any of this testimony having occurred.

Second, the nature of the testimony was as if it were designed to ensure the jury was aware of the officers' opinions. The prosecutor did not ask whether the evidence or defendant's alleged conduct was "consistent with" being involved in drug sales. The prosecutor asked if the officers had *formed opinions* about what the evidence or conduct

showed, then eliciting that the officers believed that Stone was possessing the drugs with intent to deliver - the crucial, disputed issue in the case. 8RP 180-81, 206. Montgomery cautioned against this very kind of questioning. 163 Wn.2d at 588, 592. The Court went on to say it is "unnecessary for a witness to express belief that certain facts. . . lead to a conclusion of guilt." Id.; see, Kirkman, 159 Wn.2d at 928; State v. King, 167 Wn.2d 324, 219 P.3d 642 (2009).

Yet here the prosecutor deliberately asked the officer's to express just such improper opinions.

The other Demery factors (the nature of the charges, the defense and the other evidence) support the conclusion the testimony was improper explicit or near-explicit opinion on Mr. Stone's guilt. Stone was accused of possessing with intent to deliver multiple substances, but the evidence did not necessarily show such purpose for the pills, as opposed to the "meth." All of the testimony about the huge quantity was regarding that drug, not the hydrocodone, oxycodone or Alazaprom. See e.g., 8RP 204. The defense for the pills was that the quantities of the various pills were not "dealer-level things, as you find [with] the methamphetamine." 8RP 471, 472-73. Stone admitted possessing the meth and dealing it but pointed out that the officers never asked him if he was a dealer in pills, only "meth." 8RP 469-70.

Indeed, in closing, counsel admitted the methamphetamine was a "slightly different situation," but for the other drugs there was "no indication he intended to deliver them or sell them." 8RP 472. The officers' testimony that the evidence and their "experience and

training" together led them to the "conclusion" that Mr. Stone was possessing the pills with intent to deliver was improper, unconstitutional opinion on his guilt.

Reversal is required. Where the defendant objects below, the issue is properly before the Court even if a comment is merely an inferential opinion on guilt. Here, Mr. Stone specifically objected to the comments by Investigator Martin but was overruled, and the officer allowed to state his "conclusion" "that Mr. Stone was in possession of narcotics with intent to deliver." 8RP 180-81. It is difficult to conceive of any more direct, explicit expression of opinion which could be made by an officer about a defendant's guilt. The same is true for the comments by Investigator Conlon, asked if he had "form[ed] an opinion as to what Mr. Stone was involved in," that Mr. Stone "was, in fact, selling methamphetamine." 8RP206.

Admission of improper opinion testimony compels reversal as a matter of presumption, because it is unconstitutional. Kirkman, 159 Wn.2d at 928. Only if the prosecution can meet the heavy burden of proving the constitutional error harmless beyond a reasonable doubt is the presumption of reversal overcome. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

The prosecution cannot meet that burden here. A constitutional error is not harmless beyond a reasonable doubt unless the prosecution proves that the untainted evidence of guilt is so overwhelming that it *necessarily* leads to a conclusion of guilt. State v.

Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Further, the Court must make this determination while assuming that the damaging potential of the improper opinion testimony was "fully realized." See State v. Moses, 109 Wn. App. 718, 732, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006).

It is important to note that the constitutional harmless error standard is far different than the deferential standard this Court uses in another context - the question of whether the evidence below is sufficient to support the conviction(s). See, e.g., State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002). In a case involving sufficiency of the evidence, this Court applies a presumption of affirming and does so unless the defendant meets the burden of proving that, even taken in the light most favorable to the state, *no* reasonable jury could have found guilt based on the evidence admitted at trial. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled on other grounds by, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

With the constitutional harmless error test, however, in stark contrast, the Court is *required* to reverse unless the untainted evidence of guilt is so overwhelming that no reasonable jury would *fail* to convict even absent the error. Easter, 130 Wn.2d at 242. This means the state has to prove that the constitutional error could not have had any effect on the fact-finder's decision to convict. Id.

These two standards are very different. See, e.g., Romero, 113 Wn. App. at 793 (upholding based on the sufficiency of the evidence

standard but then reversing based on constitutional error based on the very same evidence). Indeed, even where there is strong evidence of guilt in a child sex abuse case, where there is conflicting evidence as well, the evidence will not be deemed so overwhelming that it "necessarily" leads to a finding of guilt. See State v. Keene, 86 Wn. App. 589, 594-95, 938 P.2d 839 (1997).

The prosecution cannot meet its heavy burden of proof here. It cannot prove that every single juror faced with the evidence without the damaging and improper opinion of the officers would necessarily have convicted Mr. Stone of all of the counts charged. This is especially true for the counts involving the pills, for which the evidence of intent to deliver was especially tenuous. Given the direct nature of the testimony and its clear expression of the officers' explicit opinions on Stone's guilt, reversal and remand is required. At a minimum, the prosecution cannot meet the heavy burden of proving that no reasonable juror would have failed to convict Mr. Stone of possessing the hydrocodone and oxycodone with intent to deliver, under the facts in this case.

2. IRRELEVANT, HIGHLY PREJUDICIAL EVIDENCE WAS ADMITTED AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE

Only relevant evidence is admissible, and relevance requires a "logical nexus" between the evidence to be admitted and the fact to be established. State v. Whalon, 1 Wn. App. 785, 791, 464 P.2d 730, review denied, 78 Wn.2d 992 (1970). Further, it must have a "tendency" to prove, qualify or disprove an issue. See State v. Demos,

94 Wn.2d 733, 737, 619 P.2d 968 (1980). Even relevant evidence is inadmissible if its prejudicial impact outweighs its potential probative value. ER 403; State v. Vreen, 143 Wn. 2d 923, 932, 26 P.3d 236 (2001).

In this case, the prosecution admitted irrelevant, prejudicial evidence of an unrelated "BB" gun and about uncharged crimes. And despite the fact that the evidence was highly prejudicial and completely irrelevant to the charged crimes, counsel did not object.

In general, a trial court's decision to admit evidence is reviewed for abuse of discretion. Vreen, 143 Wn.2d at 932. In this case, however, counsel failed to object to any of the improper, irrelevant and highly prejudicial evidence admitted against his client. This unprofessional failure prejudiced Mr. Stone and reversal could be granted based on this ground alone.

a. Relevant facts

At trial, LPD detective Martin talked about the "common items" needed for "a trafficker," including all different kinds of guns. 8RP 138. After consulting with a police report, the investigator told the jury that, in addition to the "two-shot" gun for which Mr. Stone was charged, "[t]here was also a BB gun" found in the safe. 8RP 228.

LPD officer Ryan Hamilton, also an "investigator," talked about working with the special operations unit, dealing "primarily with vice, narcotics, and gang-related crimes and anything else the chief asks" (8RP 216). He mentioned his position was competitive and said he worked with the South Sound gang task force and FBI in Tacoma. 8RP

216. He told the jury his training and experience included an "80-hour narcotics course" (8RP 216), being a firearms instructor who trains new officers, and going to "undercover school," which he detailed as including working with informants, working undercover himself, buying drugs and guns, and knowing "how that's supposed to be done." 8RP 218.

At the prosecutor's prompting, Hamilton confirmed that, if he did not know what he was talking about, he could be put in danger. 8RP 218. Later, without defense objection, the officer testified about other crimes he thought were "common" to see with drug *users* and that drug dealers sometimes encouraged such crimes:

> A lot of times what we see is users will shoplift items because they have no source of income to support their habit. They will shoplift items from various stores, and they will trade those items for narcotics.
>
> And a lot of times the suppliers will have - - basically tell them, "Hey, I want this. I want this."

8RP 247. The officer then apparently referred to the "ledger" found in the home and declared, "these pages appear to be wish lists of different items that are wanted and where they're at." 8RP 247.

b. Counsel was prejudicially ineffective in relation to this irrelevant evidence

Both the Sixth Amendment and Article 1, § 22 of the Washington Constitution guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Counsel is ineffective if, despite a strong

presumption of capability, 1) his representation was "deficient," and 2) that deficiency prejudiced his client. See State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Ineffective assistance of counsel is a mixed question of fact and law, reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

In this case, Mr. Stone was subjected to ineffective assistance of counsel by counsel's unprofessional failures to move to exclude or at least object to the prosecution's evidence that Mr. Stone possessed the unrelated BB gun and that he might be guilty of other crimes. Counsel's representation is "deficient" if it fell below an objective standard of reasonableness, based on the circumstances of the case. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). That deficiency is prejudicial and compels reversal where, within reasonable probabilities, the outcome would have been different, absent counsel's errors. See id.

But this does *not* require proof the defendant would likely have been acquitted. Strickland, 466 U.S. at 694. A "reasonable probability" is one sufficient to "undermine confidence in the outcome." State v. Crawford, 159 Wn.2d 86, 104-105, 147 P.3d 1288 (2006). Further, it involves a low standard of proof, less than a "preponderance of the evidence." See State v. Riofta, 166 Wn.2d 358, 376, 209 P.3d 467 (2009) (Chambers, J., concurring in dissent). To determine if such a probability exists, the Court asks if it can be confident that counsel's errors had no effect on the verdict. See, e.g., State v. Boehning, 127 Wn. App. 511, 532, 111 P.3d 899 (2005).

Such a conclusion is not possible in this case. Because of counsel's unprofessional failures, Mr. Stone's jury heard both about an irrelevant, unrelated BB gun in his possession and that Mr. Stone was possibly involved in encouraging other crimes such as shopflifting, as well, even though Stone was not charged with such crimes. A defendant must be tried for the charged offense, not for uncharged crimes, and evidence of uncharged crimes is highly prejudicial and likely to improperly sway a jury. See State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952), overruled in part and on other grounds by State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

Further, evidence of an irrelevant gun is highly prejudicial, because of the strong reactions people have to such weapons. See State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984). Indeed, courts have 'uniformly condemned" admission of an unrelated gun when it is irrelevant to the charged crime. See State v. Freeburg, 105 Wn. App. 492, 502, 20 P.3d 989 (2001): see also, State v. Oughton, 26 Wn. App. 74, 83-84, 612 P.2d 812, review denied, 94 Wn.2d 1004 (1980) (knife unrelated to murder know highly questionable relevance).

Reasonably competent counsel would have made a motion to exclude such completely irrelevant, prejudicial, immaterial and prejudicial evidence. Counsel's failure to do so fell far below an objective standard of reasonableness. There was no reason for counsel not to try to exclude the evidence of the BB gun, a weapon which was found in the safe but which was not alleged for be the basis for the

firearm enhancement or unlawful possession. There was also no tactical reason for counsel to fail to try to exclude the irrelevant, prejudicial theory that Mr. Stone was also involved in related crimes such as shoplifting or theft.

When counsel is given discovery, he is on notice that any evidence mentioned in that discovery, such as in police reports about an arrest, may be attempted to be used by the prosecution at trial. See Kimmelman v. Morrison, 477 U.S. 35, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Indeed, the "adversarial testing process" does not function without defense counsel doing "some investigation into the prosecution's case and into various defense strategies." 477 U.S. at 384-85.

Further, there is more than a reasonable probability that counsel's unprofessional failures affected the outcome of the trial. Allowing admission of highly inflammatory, prejudicial irrelevant evidence of an unrelated BB gun and that Mr. Stone might have also been involved in encouraging shoplifting or other theft crimes and trading drugs for stolen good, impermissibly tainted the jury's ability to fairly and impartially decide the case. This Court should so hold and should reverse.

3. THE MULTIPLE CONVICTIONS FOR POSSESSION WITH INTENT TO DELIVER DRUGS FOUND TOGETHER IN THE SAME HOME VIOLATES THE STATE AND FEDERAL PROHIBITIONS AGAINST DOUBLE JEOPARDY

Both the state and federal constitutions protect against a person being put twice in jeopardy for the same offense. See State v. Linton,

156 Wn.2d 777, 782, 132 P.3d 127 (2006); Fifth Amend.; Art. 1, § 9. This include prohibitions against multiple convictions for the same act. See Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932); In re Personal Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); 5th Amend.; Art. 1, § 9. In this case, even if the convictions for possession of methamphetamine, oxycodone and hydrocodone with intent to deliver are upheld despite the improper, prejudicial evidence and counsel's unprofessional failures, Mr. Stone would nevertheless be entitled to reversal and dismissal of two of Mr. Stone's three convictions for unlawful possession of drugs with intent to deliver, because they violated the state and federal prohibitions against double jeopardy.

As a threshold matter, this issue is properly before the Court. Double jeopardy may be raised for the first time on appeal. See State v. Adel, 136 Wn.2d 629, 631-32, 956 P.2d 1072 (1998). Further, it is irrelevant that some of the sentences here were ordered to run concurrently. See State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007); Ball v. United States, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985). The right to be free from multiple *convictions* is not the same as the right to be free from multiple *punishments*. See State v. Turner, 169 Wn.2d 448, 454, 239 P.3d 461 (2010).

On review, this Court does not apply a deferential standard. See Turner, 159 Wn.2d at 454. Instead, review is de novo. Id.

Applying that standard here, this Court should find that the convictions for three separate counts of unlawful possession with

intent to deliver drugs found in the same place, at the same time and possessed with the same intent violated double jeopardy.

The charges for counts 1, 2 and 3, were all for violating the same statute: RCW 69.50.401(1)(2)(b). CP 40-43. Where a person is accused of violating the same provision multiple times, multiple convictions will violate double jeopardy unless each is based upon a separate "unit of prosecution." Adel, 136 Wn.2d at 634-35.

This test is different than the "same evidence" or "same elements" test of Blockburger, supra. Adel, 136 Wn.2d at 634. Under the "Blockburger" test, the court looks at the different statutes supporting the separate convictions to determine whether each crime required proof of a fact which the other did not. See State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). This test, however, applies only when the defendant is convicted of different crimes for the same conduct. See Adel, 136 Wn.2d at 634. This is because when a defendant is convicted for violated one statute several times, the "same evidence" test will never be satisfied, as the convictions will always be the same in law but never in fact. Adel, 136 Wn.2d at 633-34. In this situation, the Supreme Court explained in Adel, there will always be an attempt by the state to separate into charges "by dividing the evidence supporting each charge into distinct segments." 136 Wn.2d at 633-34. Thus, the proper test in such cases is the "unit of prosecution." Id.

With the "unit of prosecution" test, "the concern is not multiple charges under separate statutes" but instead "successive prosecutions for conduct that may constitute the same act or transaction." Adel, 136

Wn.2d at 633. Under this test, the court examines what "'unit of prosecution'" has the Legislature intended as the "punishable act." Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955); see State v. Mason, 31 Wn. App. 680, 685-87, 644 P.2d 710 (1982). If there is no indication in the statute defining the crime, then the rule of lenity applies. Adel, 136 Wn.2d at 634-35.

Notably, in applying the rule of lenity, courts have been "especially vigilant" against imposition of multiple convictions based on dividing a crime into separate units. Id.; see Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

Thus, in Mason, convictions for three counts of promoting prostitution violated double jeopardy where the proprietor of a "steam bath" was alleged to have three different women working as prostitutes at the same time. 31 Wn. App. at 687. Looking at the relevant statute, the Court found that the "apparent evils the legislature sought to attack were 'advancing prostitution' and 'profiting from prostitution[.]'" 31 Wn. App. at 687. Because "[a] person is equally guilty of either of those evils whether he has only one prostitute working for him or several," the Court concluded, only one conviction is permitted despite the number of prostitutes employed. Id.

Similarly, where the defendant had marijuana in his car and the store he ran, outside of which the car was parked, double jeopardy was violated by his separate convictions for each place of "possession." Adel, 136 Wn.2d at 636. In Adel, the Supreme Court noted the issue

was whether Adel's possession of marijuana in two places constituted just one "criminal act, or one 'unit of prosecution[.]'" 136 Wn.2d at 632. The Court then rejected the idea that the possession statute was violated multiple times by constructively possessing the same drug in different places but all within the defendant's "dominion and control."

In this case, Mr. Stone was charged in the amended information, counts 1, 2, 3 and 5, with the same offense - possession of a controlled substance classified in Schedule II as a narcotic drug, with intent to deliver. CP 40-43. More specifically, he was accused of having unlawfully, feloniously, and knowingly possessed with intent to deliver to another, on December 4, 2015, the day of the search, "a controlled substance . . . classified under Schedule II of the Uniform Controlled Substance[s] Act, contrary to RCW 69.50.401(1)(2)[.]" CP 40-43. For count I, the substance was listed only as "Methamphetamine" and the statutory cite was to "RCW 69.50.401(1)(2)(b)." CP 40. For count II, it was "Oxycodone, a narcotic," and the cite was RCW 69.50.401(1)(2)(a)-(i)." CP 41. For count III, it was "Hydrocodone, a narcotic," and the cite was RCW 69.50.401(1)(2)(a)-(i)." CP 41-42.[4] He was acquitted of all but simple possession for count 5, involving the Alprazolam.

RCW 69.50.401(1) makes it a felony to possess with intent to deliver "[a] controlled substance." RCW 69.50.401(2) then describes the relevant substances and penalties involved. Under subsection (2)(a), it is a class B felony when the controlled substance is "classified

[4]Count V was similarly charged for the same offense, using the same language, except identifying the substance as "Alprazolam, a narcotic." CP 43.

in Schedule I or II which is a narcotic drug[.]" It is also a class B felony when the controlled substance is methamphetamine. RCW 69.50.401(2)(b).

Thus, for possession with intent to deliver, the unit of prosecution is the intent to deliver the unlawfully possessed controlled substance, regardless of its type. See State v. Goodman, 150 Wn.2d 774, 783, 83 P.3d 410 (2004). RCW 69.50.401(2) makes it unlawful " to possess with intent to deliver *any* controlled substance, and for liability purposes, it does not matter what the specific substance is." State v. Rodriguez, 61 Wn. App. 812, 817, 812 P.2d 868 (1991). As one court has explained in the context of determining when counts are the same for purposes of the related determination of when charges amount to the "same criminal conduct," "if counts are different only because different drugs were possessed, they involve the same intent - the intent to deliver a controlled substance." Id.; see also, State v. Vike, 125 Wn.2d 407, 411-12, 885 P.2d 824 (1994) ("when a person possesses two drugs with the intent to deliver, the defendant still has a single mental state").

Thus, when officers found the defendant with cocaine both on the floorboard of his car and on his person which was packaged as if for sale, it was a violation of double jeopardy to impose two convictions for each possession. See State v. Lopez, 79 Wn. App. 755, 904 P.2d 1179 (1995). In contrast, where the defendant had marijuana "grow" operations in rented homes in different cities, each of them "self-contained" and "a significant distance from the other," those "separate

and distinct" operations showed a separate and distinct intent for each, so that double jeopardy was not violated by the two convictions. In re the Matter of the Personal Restraint of Davis, 142 Wn.2d 165, 176, 12 P.3d 603 (2000). And where a defendant delivered cocaine inside an apartment during a "sting" operation, he could be convicted of two counts of possession with intent to deliver for those drugs and the 83 grams of cocaine he had in his van, parked outside, because there was clearly separate intent to deliver for each possession. See State v. McFadden, 63 Wn. App. 441, 820 P.2d 53 (1991).

Thus, for possession with intent to deliver, the "unit of prosecution" is based upon the "nature of the defendant's intent" regarding the contraband, not whether there were different types of drugs so possessed. See State v. Gaworski, 138 Wn. App. 141, 150, 156 P.3d 288 (2007). And possession of multiple different drugs in the same place at the same time with the same intent. In a related context, the "same criminal conduct" rule requires that convictions of multiple counts of possession with intent to deliver different substances are considered the same for the purposes of sentencing. See State v. Garza-Villarreal, 123 Wn.2d 42, 49-50, 864 P.2d 1378 (1993). In that case, one defendant was convicted of possessing with intent to deliver cocaine and one count of possession with intent to deliver heroin. Id. The Court held, "[t]he fact that the two charges involved different drugs does not by itself evidence any difference in intent." Id.

Indeed, the Supreme Court noted, "[t]he possession of each drug furthered the overall criminal objective of delivering controlled

substance in the future." 123 Wn.2d at 49. Thus, where, as here, the defendant is in possession of multiple drugs in the same place, the same time and with the same intent, the fact that more than one drug is possessed is not enough to support different convictions.

Even if the Court does not agree that the possession of the pills and the methamphetamine was all the same "unit of prosecution," it should hold that the convictions for possession with intent for both hydrocodone and oxycodone violates double jeopardy. Below, the parties argued about whether the two substances were the same chemical, but that is not the correct question regarding double jeopardy where, as here, the case involves the "unit of prosecution," rather than the Blockburger test. See Adel, 136 Wn.2d at 634. As the Adel Court noted, applying the "same evidence" test when there are two convictions for violating separate statutes is proper, but the test does not apply when there are "[t]wo convictions for violating the same statute." 136 Wn.2d at 633-34; see, Bell, 349 U.S. at 83.

RCW 69.50.401(1) makes it "unlawful for any person" to possess with intent to deliver, "a controlled substance." While Mr. Stone maintains that it is irrelevant that the class B felonies involved are defined in two separate sections, at a minimum the convictions under (a) for the oxycodone and hydrocodone should be held to violate double jeopardy. Both were controlled substances classified in Schedule II which are narcotic drugs, under RCW 69.50.206, which defines Schedule II drugs for this state. That statute covers "opiates," as follows in relevant part:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opiate, excluding apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphene, nalmefene, naloxone, and naltrexone, and their respective salts, but including the following:

(xi) Hydrocodone; [and]

. . .

(xvi) Oxycodone[.]

Mr. Stone was found to be in possession with intent to deliver pills found in the same home, most of them in the same safe, inside the same pill containers and mixed together. He possessed them at the same place, the same time, with the same intent. His convictions for multiple violations of RCW 69.50.401(1)(2)(b) violated the prohibition against double jeopardy, because the "unit of prosecution" for possession with intent to deliver is the relevant intent to deliver, which was the same for all of the convictions on counts 1, 2 and 3. Even if the Court does not agree regarding the convictions for the possession with intent of methamphetamine and the possessions with intent of the pills, the convictions on counts 2 and 3 for possession of similar substances, mixed together, found at the same time in the same place and possessed with the same intent, violated double jeopardy.

4. THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCING ENHANCEMENTS AND COUNSEL WAS AGAIN INEFFECTIVE AT SENTENCING

At sentencing, new counsel argued that Mr. Stone was subject to "flat time" of stacking firearm enhancements, which applied with no hope of release. 8RP 516. Counsel declared that penalty harsh, said it was "nonsensical" and said he wished it "wasn't the law," but said the

legislature had declared "[w]e don't care even if it's the same course of conduct. The weapon enhancements stack." 8RP 516. The prosecutor also thought it would be a total of "24 months for the school zone, and then . . . 180 months for all the firearms consecutively to each other." 8RP 526-27. Counsel later said he thought the firearm enhancement could not "exceed" the statutory maximum of 120 months. 8RP 528. The expectation was there would be "nine years of flat time, 36 months on each[.]" 8RP 536-37.

The court also discussed it and confirmed that if there was no "doubler" applied, it would be "nine years flat," which was "36 months on each count." 8RP 537. It was clear the parties were laboring under the assumption that the law required that "all enhancements run consecutive[.]" 8RP 538, 540-41

This assumption, however, was incorrect. See, e.g., State v. McFarland, 189 Wn.2d 47, 399 P.3d 1106 (2017). Under the Sentencing Reform Act (SRA), one of the objectives of our system is proportional punishment, so that the SRA does not eliminate all sentencing discretion. See id. Where there are multiple sentencing enhancements applied in a particular case, it is generally provided that the enhancements must run consecutively under RCW 9.94A.533(e). But the law also allows for some discretion, permitting a sentencing court to *depart* from imposing consecutive sentencing enhancements when doing so offends the "multiple offense policy" that applies if the resulting sentence is unduly harsh, because the "Hard Time for Armed Crime Act" does not "preclude exceptional sentences downward." 189

Wn.2d at 111. Where the consecutive enhancements "result[] in a presumptive sentence that is clearly excessive in light of the purpose of" the SRA, a sentencing court has discretion to impose an exceptional mitigated sentence by imposing concurrent firearm enhancements.

Once again, counsel was ineffective. To be reasonable adequate, counsel is expected to know the law in relation to his client's case. See Kimmelman, supra; see Strickland, 466 U.S. at 690-91 (counsel must do sufficient investigation into relevant matters of law to make strategic choices). Because the parties were all mistaken about the sentencing court's authority, even if other remedies did not apply, reversal and remand for resentencing would be required.

5. IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS AND ONEROUS REPAYMENT TERMS AS "MANDATORY" DESPITE THE DEFENDANT'S INDIGENCE AND LACK OF PRESENT OR LIKELY FUTURE ABILITY TO PAY IS UNCONSTITUTIONAL

In arguing for the conditions of community custody, the prosecution said, "[r]egards to the fines and the fees, Your Honor, $500 crime victim penalty, $100 DNA fee, $200 court costs." 8RP 542. The prosecutor also said, "given that this is a third offense, I'm going to ask for a fine of $1,000; although that find is technically for a first-time offender for a drug-related event. But I'm going to ask for that," and that "[t]hose are all discretionary." 8RP 542. Without discussion, the judge declared:

> As to the - - Court will be imposing each of those that you have just identified, the $500 crime victim penalty assessment, the $200 in court costs, 20, $200 for the DNA sample fee, $200 for the court costs, the $250 for the drug agency fund to go to Lakewood. That is definitely appropriate.

> Also, the Court is going to impose [the] 1,000-dollar fine. This is not the first time - - I mean, this is the third time - - the third time that we've had convictions for drug-related offenses, and I do believe that it's appropriate.

8RP 543. Counsel then noted the court of appeals would "send it back" if the court did not make "an inquiry regarding my client's ability to pay." 8RP 543. The court then established that current counsel was hired by Mr. Stone's family after appointed counsel had done the entire trial and there had been serious issues between counsel and Mr. Stone. 8RP 544. Counsel told the court the only "mandatory" fees were the crime victim penalty assessment, the DNA fee and the $200 court costs. 8RP 544.

The court then agreed that Mr. Stone was "going to be incarcerated for a while," but asked if Stone believed he could be "gainfully employed" when released in 11 or so years. 8RP 544-45. Counsel said that was his "hope too" but that the inquiry was "directed towards present ability and ability to pay because the future ability is going to be a couple of decades." 8RP 545. Counsel also noted that, while there were some jobs in prison, "they are pennies an hour," and he would not have the present or future ability to pay the fines. 8RP 545.

At that point, the judge declared,

> as much as I would like to impose $1,000, I will waive that for you sir, so that you will have some additional funds, perhaps so you're able to provide some things for your son.
>
> I'm not going to waive the $250 drug agency fund, however. That you will need to pay. As well as the $500 crime victim penalty assessment, the additional $100 for the DNA, and the $200 for the court costs.

8RP 546.

The imposition - and collection - of legal financial obligations (LFOs) has constitutional limits. See State v. Barklind, 87 Wn.2d 814, 817, 557 P.2d 314 (1976); Fuller, supra. In addition, where the defendant is indigent, controlling Washington cases apply. The sentencing court here violated those constitutional, statutory and caselaw holdings in imposing "mandatory" legal financial obligations and onerous financial terms in this case, as well as a discretionary fund fee.

The U.S. Supreme Court has held that, where a state chooses to impose legal financial obligations as a condition of a criminal conviction, the system must meet certain requirements. Fuller, 417 U.S. at 45. First, repayment must not be mandatory. 417 U.S. at 45. Second, the court is required to "take into account the defendant's financial resources and the burden that payment would impose." Third, if "there was no likelihood the defendant's indigency would end," no repayment obligation may be required. 417 U.S. at 46. Fourth, no convicted person can be jailed or held in contempt for failure to pay if that failure was based on poverty. Fuller, 417 U.S. at 46. Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence. Another subsection of the same statute, however, prohibits a court from entering such an order without first considering the defendant's specific financial situation. RCW 10.01.160(3) provides:

The court shall not order a defendant to pay costs unless the

> defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

In Blazina, supra, our highest Court recently interpreted RCW 10.01.160(3). Blazina involved two consolidated cases, each with an indigent defendant. 182 Wn.2d at 828. In one case, the sentencing court ordered a $500 crime victim penalty assessment, a $200 filing fee, a $100 DNA fee, $1,500 for assigned counsel and restitution to be determined "by later order." 182 Wn.2d at 833-34. The other sentencing court ordered the same fees except only $400 for appointed counsel and an additional $2,087.87 in extradition costs. Id, Neither defense counsel raised an objection to the imposition of the costs or fees on their indigent client. Id. On review, the defendants argued that the failure to comply with the requirements of RCW 10.01.160(3) on the record was error. 182 Wn.2d at 837.

The Blazina Court found that RCW 10.01.160(3) was mandatory, noting that it requires that a trial court "**shall not**" order costs without making an "individualized inquiry" into the defendant's individual financial situation and their current and future ability to pay, and that the trial court "**shall**" take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose" in determining the amount and method for paying the costs. 182 Wn.2d at 838 (emphasis in original). And the Court found that, in this context, the word "shall" is imperative. Id.

Further, the Court agreed with the defendants in both of the

consolidated appeals that the individualized inquiry must be done on the record. 182 Wn.2d at 838. They then rejected the a "boilerplate" clause, preprinted on the judgment and sentence, as sufficient:

> Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors. . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Id.

In making the decision to address the issue, the Blazina Court noted its importance. It noted that "[n]ational and local cries for reform of broken LFO systems" demanded attention for the issue, and chronicled national recognition of "problems associated with LFO's imposed against indigent defendants," including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems "caused by inequitable LFO systems."

The Court then noted the flaws in our own state's LFO system and the system's "problematic consequences." 182 Wn.2d at 186-37. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. Id. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford $25 a month will end up owing *more* than initially imposed even after *10 years* of making payments. Id. The Court was concerned that, as a result, indigent

defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id. Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because courts retain jurisdiction until LFOs are completely paid off. 182 Wn.2d at 636-37. This increased involvement "inhibits reentry," the justices noted, because active court records will show up in a records check for a job, or housing or other financial transaction. Id. The Court recognized that this and other "reentry difficulties increase the chances of recidivism." Id.

Finally, the Blazina Court pointed to the racial and other disparities in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain types of cases, or when defendants go to trial, or when they are male or Latino. 182 Wn.2d at 637. The court also noted that certain counties seem to have higher LFO penalties than others. Id.

In this case, the judgment and sentence contained the same pre-printed clause which was found insufficient in Blazina. CP 384. Further, the imposition of drug "task force" fees is discretionary, not mandatory, yet the sentencing court made only minimal effort to determine whether it was possible that, after serving more than 9 years of "flat time," Mr. Stone thought he would still be employable. See State v. Corona, 164 Wn. App. 76, 261 P.3d 680 (2011). This Court should strike the improperly imposed "discretionary" fee and should further reverse and remand for resentencing for full, fair and complete

consideration of Mr. Stone's actual financial situation prior to imposition of any costs. Further, it should hold that failure to conduct the required analysis violates Fuller and is not constitutional, given what we now know about the practices and methods used in this state. Even if it does not grant other relief, the Court should grant reversal and remand for resentencing to address this issue.

E. CONCLUSION

For the reasons stated herein, the Court should grant Mr. Stone relief.

DATED this 4th day of October, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that I served the attached document as follows: by this Court's portal upload I filed this document with (1) the Court of Appeals Division II; Justin Stone, DOC 729991, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 4th day of October, 2017.

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